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No. 274

In the Supreme Court of the United States

OCTOBER TERM, 1960

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

WHITAKER HOUSE COOPERATIVE, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

HAROLD C. HYSTROM,
Acting Solicitor of Labor,
BERNIE MARGOLIN,
Assistant Solicitor,
SYLVIA S. ELLISON,
Attorney,
Department of Labor,
Washington 25, D.C.

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The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above case on March 2, 1960.

OPINIONS BELOW

The opinion of the District Court (R. 78–99) is reported at 170 F. Supp. 743. The opinions in the Court of Appeals (App. A, *infra,* pp. 33–34) are reported at 275 F. 2d 362.

JURISDICTION

The judgment of the Court of Appeals was entered on March 2, 1960 (App. A, *infra,* p. 43). By orders of Mr. Justice Frankfurter, dated May 27, 1960, and June 29, 1960, the time for filing a petition for a writ of certiorari was extended to and including July 30, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the relationship between the "member-producer" homeworkers and the respondent Cooperative and its managing officials—who admittedly organized the Cooperative to replace a previous relationship between the general manager and the homeworkers under another type of avoidance arrangement which was held to be covered by the Fair Labor Standards Act—is an employment relationship subject to the Act, or whether such a cooperative organization, even if *"bona fide,"* effectively converts the homeworkers into independent self-employed individuals so that the Act and its regulations restricting homework can be lawfully avoided.

STATUTE AND REGULATIONS INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, c. 867, 69 Stat. 711, 29 U.S.C. 201, *et seq.*) and the Regulations issued pursuant thereto are set forth in Appendix B, *infra,* pp. 44–52. The statutory provisions particularly involved are Sections 3(a), (d), (e), and (g) and Section 11(d), which read as follows:

> SEC. 3. As used in this Act—
>
> (a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.
>
> * * * * *
>
> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not

include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * *

(g) "Employ" includes to suffer or permit to work.

* * * * *

SEC. 11.

* * * * *

(d) The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act, and all existing regulations or orders of the Administrator relating to industrial homework are hereby continued in full force and effect.

STATEMENT

This action was filed under Section 17 of the Fair Labor Standards Act to enjoin Whitaker House Cooperative, Inc., and respondents Whitaker and Bird, from violating the minimum wage, record-keeping, and shipping provisions of the Act (Sections 6, 11(c) and 15(a)(1)), and from failing to obtain special homeworker certificates for the women who make, in their homes, the goods in which the Cooperative deals, as required by the Wage Order for the Knitted Outerwear Industry, issued pursuant to old Section 8(f)

of the Act and Section 11(c), which order was continued in full force and effect by Section 11(d), added to the Act in 1949 (App. B, *infra*, p. 45).[1]

At a pre-trial conference, respondents conceded noncompliance with the Act's requirements in the respects charged in the complaint, as well as petitioner's right to an injunction against each of them, if the homeworkers involved in this action are "employees" within the Act (R. 79). At the beginning of the trial, respondents further conceded that if the workers in question are "employees," "it would necessarily follow that they are industrial homeworkers within the meaning of the Act and [the pertinent] regulations" (Tr. 3–4).[2]

1. The Cooperative is primarily engaged in the production, sale, and distribution of articles of infants' knitwear, but it has recently added toys and women's capes and stoles to its line of merchandise. All of these goods are made by homeworkers. The finishing work (trimming and packaging) is done by admitted employees of the Cooperative. Respondent Whitaker,

[1] As originally filed, the complaint alleged similar violations on the part of Mrs. Whitaker during the period prior to July 17, 1957, when she operated the business in her own name (*i.e.*, before transferring it to Whitaker House Cooperative, Inc.). Later, however, by stipulation of the parties, the complaint was dismissed as to the violations during this earlier period (R. 78). The complaint was also dismissed against Mrs. Whitaker in her capacity as treasurer of Whitaker House Cooperative, Inc., it appearing that she had resigned from this position on October 10, 1957 (R. 89).

[2] "Tr." references are to the typewritten transcript of the trial court proceedings, which is a part of the original record that has been certified to the Clerk of this Court. The certified original record also contains the exhibits, requests for admissions and responses thereto cited in the text.

the Cooperative's general manager, first entered the infants' knitwear business about 25 years ago (R. 80). In the beginning, she furnished the yarn out of which the homeworkers made the booties, caps and sacques, but some years ago, when she ceased operations for a while, she transferred her yarn business to a neighbor, Mrs. Pearl L. Nutter—the same Mrs. Nutter who was later enjoined by the trial court below (also Gignoux, D.J.) from violating the Act in the employment of homeworkers (R. 94). See *Mitchell* v. *Nutter*, 161 F. Supp. 799 (D. Me.).

During the early years of her operations, Mrs. Whitaker disposed of her goods through various out-of-state concerns, including the Edward S. Wagner Company which also employed homeworkers and was subsequently enjoined from doing so (R. 80).[3] After she resumed operations about five years ago (R. 81), she began selling some of her goods to or through Mrs. Doris Law, who operated a similar business in Tennessee until she was enjoined from employing homeworkers in violation of the Act, in June 1957 (R. 89).[4]

During the period immediately prior to the formation of the Cooperative, Mrs. Whitaker had approximately 163 homeworkers (R. 81), who knitted or crocheted articles of infants' wear for her in their homes. At her own home in Troy, Maine, Mrs.

[3] See *McComb* v. *Edward S. Wagner Co.*, 89 F. Supp. 304 (E.D.N.Y., 1950), reversed on other grands, *sub nom. Tobin* v. *Edward S. Wagner Co.*, 187 F. 2d 977 (C.A. 2), and *Mitchell* v. *Edward S. Wagner Co.*, 217 F. 2d 303 (C.A. 2), certiorari denied, 348 U.S. 964. See also *infra*, pp. 28–29.

[4] See *Mitchell* v. *Law*, 161 F. Supp. 795 (W.D. Tenn.).

Whitaker employed a helper to trim the garments and to assemble them in sets (*ibid.*). She did not furnish the yarn during this period, and the homeworkers obtained it from a Mrs. Fannie Johnson of Unity, Maine (Tr. 27), who later joined the Cooperative (R. 12). Mrs. Whitaker, however, set the price which she would pay for the garments on a piece-rate basis (R. 81). In addition, she would show the women "samples of the sort of things" she wanted (Mrs. Whitaker's Answer to Req. for Ad. No. 19), and tell them the colors to use. If their work was unsatisfactory, she would reject it and tell them how it could be improved and the homeworkers followed her instructions to the extent that they were capable (Tr. 26). As the trial court expressly found, "the relationship between Mrs. Whitaker and these homeworkers was substantially identical to that between Mrs. Nutter and her homeworkers, which this Court described at length, and held to be an employment relationship within the Fair Labor Standards Act, in *Mitchell* v. *Nutter,* 161 F. Supp. 799 (D. Me. 1958). There can be no question that if Mrs. Whitaker were presently operating as previously, her operations would fall within the scope of *Nutter,* and an injunction should issue" (R. 81). The Wage and Hour Division of the Department of Labor had formally so advised Mrs. Whitaker in January, 1957 (R. 81–82), and it was following this advice that respondent Whitaker House Cooperative, Inc., was formed.

2. It is not disputed, and the trial court found, that Mrs. Whitaker and her attorney, respondent Bird, "actively participated in the organization of the Cooperative for the express purpose of attempt-

ing to avoid application of the Fair Labor Standards Act to the homeworkers here involved" (R. 92). Formation of the Cooperative was begun by calling a meeting of "all the homeworkers who are interested in establishing a cooperative" (R. 83). This was done by a form letter prepared by Mrs. Whitaker's attorney (R. 83). The letter assured the homeworkers that a cooperative "would enable them to comply with the Federal Laws concerning wage and hour regulations" (R. 71). It further stated that a cooperative would not only enable the workers to continue to make products in their homes, but would also "increase the uniformity of [the] products" and benefit the workers by "enabl[ing] them to purchase supplies at wholesale prices" (R. 83–84).

The organizational meeting was held in Waterville, Maine, on July 9, 1957 (R. 83). Mr. Bird presided and it was attended by Mrs. Whitaker and approximately 40 of the women who had made articles of infants' wear for Mrs. Whitaker (*ibid.*). Bird, Mrs. Whitaker, and 26 of the women present signed the original Articles of Association and approved the By-laws, which had been prepared in advance by Bird (R. 84). Two of the women had also worked for Mrs. Whitaker as trimmers (R. 85). These two trimmers and three of the homeworkers were made directors of the new enterprise (R. 84–85). Mrs. Whitaker's attorney (respondent Bird) became president; a cousin of her husband, John P. Kennedy, became vice-president (R. 84); and Mrs. Whitaker herself was made general manager (R. 87), as well as secretary-treasurer (R. 84). The final formality of filing a copy of the Cooperative's Certificate of Or-

ganization with Maine's Secretary of State was accomplished on July 18, 1957, whereupon Mrs. Whitaker ceased operating on her own, and transferred her business to the Cooperative "lock, stock and barrel" (R. 19; 26–28, 85).[5]

The By-laws state that the objective of the Cooperative is to promote the "economic welfare of members" (R. 85) and provide that "All persons, including married women and minors, firms and corporations shall be eligible for membership" (Art. 6, Sec. 1; Pltf's. exh. 2). Homeworker-applicants for membership are required to buy from the Cooperative a sample "of the work that they are to do" (R. 43), copy the sample, and submit the copy to the Cooperative (R. 54). If the work is found to be satisfactory, the applicant becomes a member upon purchasing a membership interest for $3.00 and agreeing to comply with the Articles of Incorporation and the By-laws (R. 86). The By-laws, among other things, prohibit members from furnishing knitted articles of the type dealt in by the Cooperative to other businesses (Art. 13, Sec. 3; R. 54) and require that members remain such for at least a year (Art. 6, Sec. 6; Pltf's. exh. 2). Members, however, may be "expelled" sooner for violation of any rules or regulations or if their work is substandard (which has been the reason assigned for "expelling" at least three members) (R. 62).

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[5] The Cooperative was chartered as a corporation under Maine's Consumer's Cooperative Act (R.S. Me., 1954, c. 56), but, as respondents have conceded, there is a serious question as to its legality since that Act contains no provision for the organization of a merchandising cooperative such as here involved (R. 93).

The financial interest of the members in the Cooperative is meager. As noted above, a membership interest costs only $3.00, and the By-laws specifically provide that "No member shall be liable for any debts or obligations of the Cooperative; nor shall any member be liable for any assessment" (Art. 4, Sec. 2; Pltf's. exh. 2).

The members have little or no entrepreneurial skill,[6] and their participation in the control of the Cooperative is as slight as their financial interest. Two membership meetings have been held since the Cooperative was organized in July 1957, but neither meeting had a quorum which, under the By-laws, is 51 percent of the members (R. 86). At the special meeting held in October 1957, only 41 out of 172 members were present (R. 37, 55). At the annual meeting held in June 1958, the Cooperative had 195 members, but only 37 attended the meeting (R. 30). Neither meeting was adjourned for lack of a quorum, as the By-laws require (see Article 7, Section 7; Pltf's. exh. 2), and at the June 1958 meeting the 37 members in attendance proceeded to "amend" the By-laws "so that 25 members constitute a quorum" (R. 58) and then "elected" officers and directors for the ensuing year (*ibid.*).

Under the By-laws, management of the Cooperative is vested in its Board of Directors and general

[6] The Cooperative's accountant made this clear when he stated that "after the Cooperative gained momentum [during the fall, the late fall], the members sent in material in tremendous quantities, not being aware—after all, they have no reason to be aware—that the big season for the Christmas merchandise * * * is not just before Christmas but is back in August and September * * *" (Tr. 275).

manager (R. 86–87). The three most faithful members of the Board are Mrs. Leavitt and Mrs. Edmonds, both of whom had previously worked for Mrs. Whitaker as trimmers (R. 84–85), and Mrs. Ella Banton, (a former homeworker for Mrs. Whitaker) who now serves as the Treasurer (R. 41, 44).[7] Mrs. Leavitt has attended all Board meetings, except one (R. 59–68). Mrs. Edmonds has not missed a single meeting (*ibid.*), and neither has Mrs. Banton (R. 41). The Board meets monthly at Mrs. Whitaker's home. Between monthly meetings, Mrs. Whitaker is in full charge of the Cooperative .(R. 29). Although the By-laws provide that the manager is to run the business subject "to the direction, management and control of the Board of Directors" (R. 87), Mrs. Whitaker testified that she has "no particular way of knowing the actual contents of the records of the [Board's] meeting[s]" (R. 111); that she has never bothered to read through all of the minutes (*ibid.*); and that she frequently leaves the meetings after giving her report on the affairs of the Cooperative (R. 88–89).

Except for changes necessitated by the new form of operating, the business is conducted in much the same way that it was conducted by Mrs. Whitaker prior to formation of the cooperative. Operations are still conducted from Mrs. Whitaker's home, and she, as general manager, still receives the articles sent in or delivered to her home by the workers (R. 88).

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[7] Mrs. Banton was "appointed" Treasurer by the Board of Directors when Mrs. Whitaker resigned as such (R. 61), although the By-laws provide that officers shall be elected by the members (Art. 10, Sec. 1; R. 53).

The articles are still unfinished and must be trimmed and packaged. The homeworkers are still paid on a piece-rate basis, the rates having been established by "management with the consent of the Board of Directors" (Whitaker Cooperative's answer to plaintiff's Interrogatory No. 9);[8] and the homeworkers are still told what to make, the colors desired, and the designs to be followed (R. 24). As Mrs. Whitaker explained, "we couldn't work any other way" (*ibid.*).

As pointed out *supra*, p. 6, when Mrs. Whitaker operated the business in her own name, the homeworkers bought their yarn from Mrs. Fannie Johnson of Unity, Maine. It appears that they still get yarn from Mrs. Johnson, and that she, too, has joined the new enterprise (R. 12). Mrs. Doris Law, who used to deal with Mrs. Whitaker before her operations in Tennessee were enjoined (see *supra*, p. 5), has also joined the new enterprise. She is the Cooperative's "exclusive sales agent" (R. 89) and has been such almost from the beginning (R. 60).

Since the advent of Mrs. Law, the Cooperative has grown in membership. It now has some 200 members, many of whom live in Tennessee (R. 8–17).[8a] It has also expanded its line of merchandise to include toys and women's capes and stoles (R. 112–113). Still further expansion is expected, if respondents

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[8] The piece rates are now referred to as "advance allowances." They are, however, definite amounts, and the homeworkers expect to be, and are, in fact, paid on the basis of such rates (R. 39, 52).

[8a] The names of the Tennessee members are, in many instances, identical to those of Mrs. Law's homeworkers as set forth in *Mitchell* v. *Law*, *supra*, p. 5, fn. 4, or so similar as to suggest they are the same persons.

should prevail in this litigation;* and the By-laws and charter are broad enough to permit this. The By-laws do not limit membership to residents of the New England states or Tennessee, and the Cooperative now has members in ten different states (R. 8–17). Nor does the Cooperative's charter restrict production to articles of infants' wear. On the contrary, as the trial court noted, the charter states that the purposes of the Cooperative "shall be, among others, 'to manufacture, sell and deal in knitted, crocheted, and embroidered goods of all kinds and in general to carry on a knitted wear business of making and selling knitted, crocheted, or embroidered clothing either at wholesale or retail'" (R. 85).

Despite the Cooperative's growth and expansion, it has not yet been a financial success. This is because its operating expenses, particularly the salaries fixed for respondents Whitaker and Bird and the 20 percent sales commission for Mrs. Law (the exclusive sales agent), are such that the Cooperative "could survive as a financially solvent enterprise only by doubling its present gross income" (R. 91). Even then the homeworkers would apparently still be receiving the same substandard rates that they are now

*While respondents' accountant was being questioned about the financial condition of the Cooperative and its prospects for the future, he said: "What is expected is that if fortunately for them the Cooperative and its officers should prevail in this action, they will be swamped with business. Many people, there is no question, are waiting to see how this comes out and who have said they won't send anything into the Cooperative until they know that the Cooperative is going on * * *" (Tr. 279).

being paid, with little or no hope of receiving anything additional by way of dividends. The Cooperative's accountant testified, "If the business were approximately doubled and ran shall we say from $85,000 to $90,000 gross sales, the ratio of commissions and payments to members would be unchanged" (R. 51). While he stated that the "remainder which would be left * * * would be sufficiently large so that something at [the Cooperative's then] general level of overhead could be carried" (*ibid.*), the Cooperative's outstanding debts would have to be paid before there would be any excess receipts for distribution to the members. As of September 4, 1958, the Cooperative was indebted to Mrs. Whitaker in the amount of $7,908 for back salary and inventory. It was also behind in respondent Bird's salary to the extent of $1,200, and owed commissions to Mrs. Law in the amount of $2,550 (R. 73–74).

3. On this record, the trial court found that Whitaker House Cooperative, Inc., is a bona fide cooperative,[10] and held that it did not "suffer or permit" its producing-members to work, within the meaning of the Act (R. 92). The basis of the holding is not entirely clear. At one point, the court expressed the view that "the members are engaged, through the Cooperative, in a joint venture" (R. 98), thus indicat-

[10] While we believe this finding is clearly erroneous, we do not challenge it in this petition because we think, as Judge Aldrich did, that "the matter lies deeper than this" (App., *infra*, p. 40). However, we reserve the right to question the correctness of the finding that the Cooperative is a "bona fide" member-controlled organization, if certiorari should be granted.

ing that it may have considered the Cooperative and its members to constitute a single entity. At another point, however, the court seems to have recognized that the Cooperative was a separate entity from its members. "It," said the trial court, "has no connection with their labors. Rather, they [the members], collectively, 'suffer or permit' themselves individually to work" (R. 99).

The Court of Appeals affirmed, with Judge Aldrich dissenting, and with the two majority judges (Chief Judge Woodbury and Judge Hartigan) each writing a separate opinion (App. A, *infra*, pp. 33–43).

REASONS FOR GRANTING THE WRIT

I

The court below has decided an important question concerning the Fair Labor Standards Act's coverage of homeworkers. While this Court has not as yet ruled specifically on this particular problem, it has recognized the importance of related questions—the meaning and scope of the Act's employment relationship coverage (*Rutherford Food Corp.* v. *McComb*, 331 U.S. 722; *United States* v. *Rosenwasser*, 323 U.S. 360; *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, at 150–151), and the scope of the statutory authority to restrict or regulate homework in order to prevent the circumvention of, and to safeguard, the statutory minimum wage rate (*Gemsco, Inc.* v. *Walling*, 324 U.S. 244). The question presented by the instant case is at least as far-reaching and important to the administration of the Act as the issues reviewed and determined in those cases.

The decision below is the first court of appeals decision, during the almost 22 years since the enactment of the Fair Labor Standards Act, to hold that the applicability of this Act to homeworkers can be avoided by a legal arrangement or organization purporting to deal with them as independent contractors or independent producers, but retaining large measures of actual control in a few principal individuals. The general problem of homeworker activity is not a novel one, having been litigated in numerous cases in the lower courts.[11] However, since

[11] There have been many cases in the infants' knitwear industry alone. See *McComb* v. *Edward S. Wagner Co.*, 89 F. Supp. 304 (E.D.N.Y.), affirmed in part and reversed in part, *Tobin* v. *Edward S. Wagner Co*, 187 F. 2d 977 (C.A. 2); *Durkin* v. *Edward S. Wagner Co.*, 115 F. Supp. 118 (E.D. N.Y.), affirmed, *Mitchell* v. *Edward S. Wagner Co.*, 217 F. 2d 303 (C.A. 2), certiorari denied, 348 U.S. 964; *Harwood* v. *Tobin*, 194 F. 2d 538 (C.A. 6), affirming *Tobin* v. *Harwood*, 10 WH Cases 73, 19 Labor Cases Para. 66, 199 (W.D. Tenn.); *Mitchell* v. *Law*, 161 F. Supp. 795 (W.D. Tenn.); *Mitchell* v. *Nutter*, 161 F. Supp. 709 (D. Maine). See also *Jacobs* v. *Hand Knitcraft Institute*, Civil No. 6–354 (S.D.N.Y.), consent decree entered on November 21, 1939, against eleven hand knitcraft companies, the main firms then utilizing substantial numbers of homeworkers (not officially reported, but printed in 2 Labor Cases (CCH) para. 18,478 and summarized in 2 Wage and Hour Reporter 499, November 27, 1939 issue) (see *infra*, pp. 18–19).

For decisions of Courts of Appeals in other industries, see *Walling* v. *American Needlecrafts, Inc.*, 139 F. 2d 60 (C.A. 6) (embroideries industry); *Fleming* v. *Palmer*, 123 F. 2d 749 (C.A. 1), certiorari denied, 316 U.S. 662 (embroideries industry): *Walling* v. *Twyeffort, Inc.*, 158 F. 2d 944 (C.A. 2), certiorari denied, 331 U.S. 851, rehearing denied, 332 U.S. 785 (garment industry); *McComb* v. *Homeworkers' Handicraft Cooperative*, 176 F. 2d 633 (C.A. 4), certiorari denied, 338 U.S. 900 (bag manufacturing industry).

The district court decisions involving homeworkers in such other industries are legion. See *Walling* v. *Wolff*, 63 F. Supp.

the appellate courts have consistently held homeworkers to be employees subject to the Act, regardless of a variety of legal arrangements designed to avoid coverage, the danger of a widespread homeworker problem has been forestalled without need for review by this Court. But there is now a pressing need for review of the decision below, because, in our view, it affords an easy means of vitiating the effect of this long line of previous court decisions, and threatens a widespread revival of the serious homeworker problem which existed in the infants' knitwear industry, as well as in other industries, at the time of the enactment of the Fair Labor Standards Act.

The industry most immediately affected is the knitted and crocheted infants' wear industry which has been traditionally classified as a branch of the knitted outerwear industry. While the respondent

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605 (E.D.N.Y.) (embroideries industry); *Walling* v. *Frunk*, 62 F. Supp. 261 (W.D. Ky.); *Walling* v. *F. L. Dunne Co.*, 7 WH Cases 317 (D. Mass.), 13 Labor Cases (CCH) para. 64,045; *Walling* v. *Malouf*, 7 WH Cases 1068 (S.D. Calif.), 12 Labor Cases (CCH) para. 63,740 (garment industry); *Mitchell* v. *Roberts*, 179 F. Supp. 247 (S.D. Calif.); *Mitchell* v. *American Republic Ins. Co.*, 151 F. Supp. 529 (S.D. Iowa); *Durkin* v. *Shone*, 112 F. Supp. 375 (E.D. Tenn.); *Walling* v. *Sieving*, 5 WH Cases 1009 (N.D. Ill.), 11 Labor Cases (CCH) para. 63,098 (direct mail advertising industry); *Mitchell* v. *Northwestern Kite Co.*, 130 F. Supp. 835 (D. Minn.); *Walling* v. *Hastings*, 6 WH Cases 554 (S.D. Ind.), 11 Labor Cases (CCH) para. 68,485; *Nelson* v. *Kuepper Favor Co.*, 1 WH Cases 854 (N.D. Ill.) (novelty manufacturing industry); *Walling* v. *Freidlin*, 66 F. Supp. 710 (M.D. Pa.) (rug industry); *Fleming* v. *Demeritt Co.*, 56 F. Supp. 376 (D. Vt.) (clothespin manufacturing industry); *Mason* v. *T. & P. Optical Mfg. Co.*, 42 F. Supp. 98 (S.D.N.Y.) (optical industry).

Cooperative's business thus far has related largely to articles of infants' wear, its charter does not so restrict it, and at the time of the trial the Cooperative had already extended its activities to include some women's knitted outerwear (R. 112; see the Statement, *supra*, pp. 4, 11–12). These two industries—infants' and women's knitted outerwear—were, at the time of the enactment of the Fair Labor Standards Act, foremost among those whose labor standards were plagued by a serious homeworker problem (see *Industrial Homework Under the National Recovery Administration*, United States Department of Labor, Children's Bureau, Publication No. 234, pp. 21–32). At the time of the N.R.A. study, in 1936, there were reported to be some 17,000 homeworkers, located in 29 states, being utilized in the knitted outerwear industry, large numbers of whom had been recruited in small towns and rural districts by New York manufacturers and distributors in order to be free from the New York homework law prohibiting work on infants' clothing in tenements (*id.* at 24–25). The homeworkers in the infants' wear branch of the industry were the lowest paid of any workers in any of the 28 industries then using substantial numbers of homeworkers (*id.* at 28, 2), two-thirds of such homeworkers earning less than 5 cents an hour and almost one-half earning no more than 3 cents an hour (*id.* at 13, 17, 28). In the women's knitted garment branch of the industry, although the earnings were not quite so low (but only a few of the most skilled earned as much as 15 cents an hour), the evil of excessively long working hours was most prevalent, "a working week of 50,

60, and even 70 hours [being] not uncommon" (*id.*, 40).

Upon enactment of the Fair Labor Standards Act, the significance of the homeworker problem to the enforcement of the statutory minimum labor standards in the knitted outerwear industry (including specifically the infants' wear industry) was at once apparent. During the first year of the Act's operation, the Administrator was confronted with a large-scale overt plan, on the part of the principal manufacturers and distributors in the knitted outerwear industry, to avoid the Act's application to homeworkers by a so-called "purchase and sale" arrangement whereby the homeworkers were designated as "manufacturers" and any employment relationship was explicitly disclaimed. This serious threat to the enforcement of the Act in the industry which employed the notoriously lowest paid homeworkers was forestalled, and the problem had been largely resolved by the end of the first year of the Act's operation, by a consent decree issued November 21, 1939, enjoining the 11 principal manufacturers and distributors in this industry from paying any of their homeworkers less than the minimum wage or employing them for longer hours without paying statutory overtime, and, also, specifically, "[f]rom using or adopting any scheme or device, or taking any action directly or indirectly, to evade the provisions of the Act or of this judgment, and in particular but without limiting the generality hereof, from using or adopting any scheme or device involving so-called purchase and sale arrangements with any homeworkers or other employees." *Jacobs* v.

Hand Knitcraft Institute et al, Civil No. 6–354 (S.D. N.Y.), not officially reported, 2 Labor Cases (CCH) para. 18,478, page 145.

This consent decree was supplemented by inclusion in the Knitted Outerwear Wage Order, issued April 3, 1942, of a prohibition of homework in the industry except by persons who obtained special homework certificates issued pursuant to regulations of the Wage and Hour Division of the Labor Department (*supra,* pp. 3–4; *infra,* pp. 45–52; 7 Federal Register 2592, April 4, 1942, subsequently codified, as amended, in 29 C.F.R. Part 530). These regulations received explicit legislative ratification by the enactment of Section 11(d), *supra,* p. 3, in the 1949 Amendments to the Act (*infra,* pp. 26–28). During the 18 years since the effective date of the Wage Order restriction on homework, there have been several sporadic attempts (by firms or persons not enjoined by the above consent decree) to avoid or evade the application of the Act and the regulations, but the consistent judicial condemnation of these attempts (see the decisions cited *supra,* pp. 15–16, n. 11), bolstered by the explicit legislative approval of the homework restrictions and repeated legislative refusal to enact proposals to exempt rural homeworkers from the requirements of the Act (*infra,* pp. 25–28), has thus far prevented the revival of a serious homeworker problem in this and other industries.

The decision below affords an easy means for revival of the previous serious homework problem throughout the Nation—not only in the infants' hand-knitted wear industry, but in the knitted outerwear industry generally, and also in the embroideries in-

dustry—and without even any need for organization of new cooperatives. While the respondent Cooperative had acquired, at the time of trial, only 200 homework members located primarily in rural areas of Maine and Tennessee (but also a few scattered members in eight other States, R. 8–17), its charter is not limited to any particular regions nor to knitted infants' wear, but includes in its purposes "to manufacture, sell and deal in knitted, crocheted, and embroidered goods of all kinds and in *general to carry on a knitted wear business*" (R. 85; emphasis added), and its by-laws provide for unlimited expansion by making "all persons, including married women *and minors*, firms and corporations * * * eligible for membership." (By-laws, Art. 6, Sec. 1; Deft's Exh. 2; emphasis added). Thus, under the ruling below, the homeworker problem in the embroideries industry, which has long been regarded as settled since this Court's decision in *Gemsco* v. *Walling*, 324 U.S. 244 (upholding the validity of the regulation prohibiting homework in this industry), could well be revived through expansion of the operations of the respondent Cooperative (see also *supra*, p. 12, fn. 9). An aggravated aspect of this threatened revival is its child labor implications. As pointed out in *Gemsco*, it was undisputed that in the embroideries industry, in addition to the prevalence of substandard piece rates, "hidden child labor [was] a widespread characteristic of the system, discoverable only after extensive investigation presenting an almost insurmountable problem for enforcement agencies, employers and homeworkers themselves" (324 U.S. at 253 n. 17).

Since the employment definitions of the Act apply to its child labor restrictions as well as to the wage and hour standards (see *Rutherford, supra,* 331 U.S. at 728), the decision below likewise has serious child labor implications.

Even if there were reasonable assurances that this particular Cooperative would not expand its operations into other industries, the effect of the holding below on other industries would nonetheless be substantial, since the same disposition to avoid the Act's application to homeworkers has been evidenced in other industries to which the cooperative form of organization here involved is as readily adaptable (see *supra,* p. 15, fn. 11).

II

The court below clearly erred in holding that the homeworkers in the respondent Cooperative are not "employees" covered by the Fair Labor Standards Act. The admitted facts in this record, evaluated under the historical criteria governing application of this Act, should have compelled a ruling of coverage.

A. The record reveals that the Whitaker House Cooperative, Inc., was admittedly organized on the initiative of respondent Whitaker and her attorney (respondent Bird) for the purpose of avoiding the application of the Act to homeworkers in the knitwear industry who, in a consistent line of judicial decisions involving other comparable avoidance arrangements (see fn. 11, *supra,* pp. 15–16), had been held to be employees subject to the Act and to the homework regulations. See the Statement, *supra,* pp. 5, 6–7. The original

incorporators were Mrs. Whitaker and Bird, and some 26 homeworkers who had previously made knitwear for Mrs. Whitaker under an arrangement which the trial court found had been an employment relationship subject to the Act (*supra*, p. 6). The Cooperative now has 200 homeworker-members, located in ten scattered states but primarily in rural areas of Maine (where Mrs. Whitaker had previously conducted her individual business) and Tennessee (where the Cooperative's "exclusive sales agent" (Mrs. Law) had previously conducted a similar business until enjoined from employing homeworkers), and, as we have pointed out (*supra*, pp. 16–17, 20), further expansion is contemplated and is provided for in the charter and by-laws.

Before becoming members, all of the homeworkers, except the few original incorporators, must prove their qualification as knitters by purchasing a sample of work from the Cooperative, copying it, and submitting the copy for approval by the Cooperative's Board of Directors or authorized representative, in addition to purchasing a membership interest at the cost of $3.00, and agreeing to abide by the Cooperative's by-laws, rules, and regulations. The by-laws, which were prepared in advance by respondent Bird and approved by the original incorporators, provide that members may not withdraw from membership for at least a year, and may not make or sell to any other business the same or similar products being produced by the Cooperative, but that they may be "expelled" for failure to observe the by-laws or any rules and regulations. The Cooperative's Board

or managing officials, in addition to the authority to pass upon membership applications and to "expel" members for failure to observe the by-laws, rules and regulations or for substandard work (which has been exercised in several instances)—*i.e.*, to hire and fire the homeworkers—, also fix the "prices" or piece rates which are paid to the "member-producers," and instruct them as to the designs and colors to be used in the work. See the Statement, *supra*, pp. 8–11.

The incidents of this relationship must be judged by the all-inclusive statutory definitions of employment, construed so as to accomplish the broad ameliorative Congressional purposes, and not by the particular legal labels attached by the parties—such as "independent contractor" or "cooperator." *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 729; *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, 150–151; *United States* v. *Rosenwasser*, 323 U.S. 360, 362; *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111; *United States* v. *Silk*, 331 U.S. 704; *Powell* v. *U.S. Cartridge Co.*, 339 U.S. 497, 528 (dissent).[12] Under that directive, the homeworkers here must be characterized as employees, since they are no more truly independent manufacturers or contractors than were the workers in the various homeworker plans previously outlawed by

[12] Of particular significance is this Court's citation in *Rutherford*, *supra* (331 U.S. at 729, n. 8), of the homeworker decisions of the Sixth and Second Courts of Appeals in *Walling* v. *American Needlecrafts, Inc.*, 139 F. 2d 60 and *Walling* v. *Twyeffort, Inc.*, 158 F. 2d 944 (discussed *infra*, pp. 29 *ff*), and the denial of certiorari in *Twyeffort* on the same date (331 U.S. 851).

the courts under this Act (*supra*, n. 11, pp. 15–16). The significant control retained by the managers of the Cooperative is plainly sufficient to bring these homeworkers within the statutory coverage.

Moreover, the reasoning below, that the work performed by producer-members of the Cooperative is not performed as employment because "[t]heir interests as members and producers are identical" (App. A, *infra*, p. 38), is inconsistent with this Court's decisions holding that a cooperative or corporation, deliberately organized as "an independent entity," is "a separate business organization" from its members, and that its independent status may not be disregarded in order to avoid statutory obligations imposed for the protection of the public. *Farmers Irrigation Co.* v. *McComb*, 337 U.S. 755, 768; *Boutell* v. *Walling*, 327 U.S. 463, 468, see also *Schenley Corp.* v. *United States*, 326 U.S. 432 at 437. As pointed out in Judge Aldrich's dissent (App. A, *infra*, p. 42), even if the homeworkers had a true proprietary interest in the Cooperative and a real voice in its management, this would not preclude their having an employment relationship with the corporate entity, particularly in terms of the social philosophy of this Act.[13]

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[13] Not only does the statutory definition of "employer" include "any person acting directly or indirectly in the interest of an employer," defining "person" to mean "individual, partnership, association, corporation * * * or any organized group of persons" (Sections 3(a) and (d)), but the legislative history confirms the Congressional intent to include cooperatives within the scope of the Act. In the earliest discussions of the legislation it was specifically pointed out that the general statutory

B. That the Act should be interpreted as covering these homeworkers is confirmed by the legislative history of the 1949 homework amendment to the Act and of the many unsuccessful bills designed to exempt the very class of rural homeworkers here involved.

In 1939, before the Act was a year old, several bills were introduced in the House of Representatives for the purpose of amending Section 14 so as to authorize the Administrator specifically to permit the employment of rural homeworkers at wage rates lower than the statutory minimum.[14] In its report accompanying

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language would apply to cooperative organizations unless specific exemptions were framed to exclude them. See 81 Cong. Rec. 7873, 7876, 7927. An amendment exempting specified cooperative associations was introduced by Senator Borah and adopted by the Senate. 81 Cong. Rec. 7947. A similar proposal was introduced in the House. 82 Cong. Rec. 1776. These provisions were omitted from the Act as adopted.

[14] H.R. 5435, the first Norton bill, amended by the House Committee on Labor; H.R. 6406, the second Norton Bill; H.R. 7133, the Barden Bill; H.R. 7349, the Ramspeck Bill. The bills were virtually identical in their proposal for the amendment of Section 14, as follows: "The Administrator shall promulgate regulations permitting the employment, in rural areas, of employees in the home at such wages lower than the minimum wage applicable under section 6, and containing such provisions governing the piece rate to be paid, the time of day during which such work shall be performed, and such other provisions, as the Administrator may prescribe. No such regulation shall be promulgated with respect to any employees (1) if in the opinion of the Administrator the application of section 6 to such employees does not have the effect of curtailing the opportunities of such employees for employment; (2) if the promulgation of such regulation would in the opinion of the Administrator have the effect of curtailing employment in the factories or industrial establishments, if any, in which similar work is performed; or (3) if the promulgation of such regulation would in the opinion of the Administrator give the em-

the proposed amendment for homeworkers, the House Committee on Labor stated: "The act at the present time treats homeworkers just as any other type of employee" (H. Rept. 522, 76th Cong., 1st Sess., p. 10). It was argued that the proposed amendments would restore to rural people additional income which they could earn from industrial homework if the wage and hour requirements were lifted (86 Cong. Rec. 4924, 5122). But the amendments were finally rejected because of the conviction that the economic evils which the Act prohibited should not be restored and that the original legislative aim to include industrial homeworkers within the full scope of the Act was in every respect sound. See, *e.g.*, 86 Cong. Rec. 5225, 5136.

Following this compelling evidence of the original and continuing Congressional intent to include homeworkers within the scope of the Act, the Administrator issued regulations restricting the employment of homeworkers in the several industries in which homework was found to be most prevalent. Although Congress was repeatedly advised of the issuance of these regulations in the Administrator's annual reports,[15] no further attempt to exempt rural homeworkers was made until the 1949 Amendments to the Act were under consideration. At that time Congressman Cooper of Tennessee proposed, and the House adopted (95 Cong. Rec. 11209–11210), an amendment which would have exempted from the Act "any

ployer or employers of such employees a substantial competitive advantage."

[15] Annual Reports of the Administrator to Congress 1943, pp. 19–20; 1944, p. 17; 1946, p. 5; 1947, pp. 32–33; 1948, pp. 15–17; 1949, p. 29.

homeworker in a rural area who is not subject to any supervision or control by any person whomsoever, and who buys raw material and makes and completes any article and sells the same to any person, even though it is made according to specifications and the requirements of some single purchaser" (Section 13(a)(17) of H.R. 5856). In explaining "the situation sought to be taken care of by this amendment," Congressman Cooper said (95 Cong. Rec. 11209):

> There are several hundred women throughout Tennessee, mostly around Gibson County * * * who have for several years made crocheted and knitted articles of wearing apparel, principally for babies, and sold them to anyone who might want to purchase them. In recent years Mrs. Doris Harwood, of R.F.D., Trenton, Tenn., has been operating a small business from her home, about 4 miles from Trenton. She buys these articles from the women of that section, who are largely farmers' wives * * *.
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> * * * * *
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> It is my understanding that the Wage and Hour Division * * * has notified Mrs. Harwood that she could not buy any of this crocheted wearing apparel from any of these women unless they were physically handicapped and that they were required to have a medical certificate to this effect before they could make these articles and sell them to her.[18]

[18] This is the same Mrs. Harwood who was enjoined from employing and underpaying non-certificated homeworkers in *Harwood* v. *Tobin*, 194 F. 2d 538 (C.A. 6), affirming *per curiam* the decision of the district court (not officially reported), 10 WH Cases 73, 19 Labor Cases Para. 66, 199 (W.D. Tenn.). See *infra*, pp. 29 *ff*.

The Senate bill contained no such exemption. The conference agreement followed the Senate and established no exemption for homeworkers; the Conference Report makes clear that this omission was not unintentional. H. Rept. 1453, 81st Cong., 1st Sess., 95 Cong. Rec. 14933. On the contrary, there was added new subsection 11(d) (*supra*, pp. 3, 19), continuing in full force and effect the administrative homework regulations which had theretofore been issued, and, in addition, authorizing the Administrator to restrict or prohibit homework. 95 Cong. Rec. 14927. And in every Congress since 1949, bills identical to Congressman Cooper's proposal have been offered, but all have failed to gain legislative approval.[17] This informed acquiescence by Congress, consistently since 1939, in the broad application of the Act to homeworkers should be given special weight.[18]

III

The decision below, in approach and in result, runs counter to the rulings of other courts of appeals on closely analogous facts raising homeworker prob-

[17] H.R. 4661, 82d Cong., 1st Sess., Congressman Cooper; H.R. 237, 83d Cong., 1st Sess., Congressman Cooper; S. 1950, 83d Cong., 1st Sess., Senator Kefauver; H.R. 84, 84th Cong., 1st Sess., Congressman Cooper; S. 2963, 84th Cong., 2d Sess., Senator Payne; H.R. 8809, 84th Cong., 2d Sess., Congressman McIntire of Maine; H.R. 2818, 85th Cong., 1st Sess., Congressman McIntire; S. 1160, 85th Cong., 1st Sess., Senator Smith of Maine; S. 25, 86th Cong., 1st Sess., Senator Smith; H.R. 5713, 86th Cong., 1st Sess., Congressman McIntire.

[18] *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 543; *Alstate Construction Company* v. *Durkin*, 345 U.S. 13, 17; *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254, 270; *Steiner* v. *Mitchell*, 350 U.S. 247, 255.

lems—in particular, with the Sixth Circuit's decisions in *Harwood* v. *Tobin*, 194 F. 2d 538, and *Walling* v. *American Needlecrafts, Inc.*, 139 F. 2d 60, and with the Second Circuit's decisions in *Mitchell* v. *Edward S. Wagner Co.*, 217 F. 2d 303, affirming 115 F. Supp. 118 (E.D.N.Y.), certiorari denied, 348 U.S. 964, and *Walling* v. *Twyeffort, Inc.*, 158 F. 2d 944, certiorari denied, 331U.S. 851. The *Wagner* and *Harwood* decisions concerned the very homeworkers who are involved in the instant case and who are making the same kind of knitted and crocheted articles for respondents under virtually the same practical conditions, despite formal differences in the mechanisms utilized. In *Wagner*, which involved New England homeworkers, the device was a "purchase and sale" arrangement, and in *Harwood*, involving Tennessee homeworkers, it was a "*del credere* agency" arrangement.[19]

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[19] *Harwood* and *Wagner* were the decisions which motivated the unsuccessful legislative proposals discussed *supra*, pp. 26–28.

The majority below ignored these decisions apparently because they did not involve the cooperative form, but relied instead on the district court's decision in *Walling* v. *Plymouth Mfg. Corp.*, 46 F. Supp. 433 (N.D. Ind.), affirmed on other grounds, 139 F. 2d 178 (C.A. 7), certiorari denied, 322 U.S. 741. Apart from the fact that *Plymouth* did not involve either homeworkers or the incorporated cooperative device, the case was decided before this Court's *Hearst*, *Silk*, and *Rutherford* decisions, and its holding is out of line with the great body of law interpreting social legislation. It is also to be noted that, while the court permitted the officials in control of the business (the "senior partners") to escape responsibility as the "employer," it expressly declined to decide whether the enterprise was operated by "a partnership composed of all the parties who signed the so-called partnership agreement" or whether,

The decision below must also be contrasted with the Fourth Circuit's decision in *McComb* v. *Homeworkers' Handicraft Cooperative,* 176 F. 2d 633 (C.A. 4), certiorari denied, 338 U.S. 900; and with the First Circuit's own earlier decision in *Fleming* v. *Palmer,* 123 F. 2d 749, certiorari denied *sub nom. Caribbean Embroidery Cooperative, Inc.* v. *Fleming,* 316 U.S. 662. These cases, as the court below apparently recognized, involved cooperative organizations paralleling the legal form of respondent Whitaker House Cooperative. The court's distinction of the instant case on the ground of the "district court's finding of a *bona fide* cooperative with control by the member-producers" (App. A, *infra,* p. 35) is not borne out by the *Homeworkers' Handicraft* decision. The Fourth Circuit there reversed the district court, despite the finding that the homeworkers were "independent contractors functioning through the cooperative" (176 F. 2d at 635), stating (through Chief Judge Parker) that the homeworkers' status as employees "has not been affected by the organization of the cooperative, whatever view be taken as to who exercises the real control over it" (*ibid.*) and approving as "manifestly sound" the view "that the 'law of independent contractors,' so far as the Fair Labor Standards Act is concerned, cannot nullify the will of Congress, and take away the benefits of the statute from pieceworkers in the needlework trades, even in the absence of a showing

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assuming the existence of "such larger partnership * * * the workers [the so-called "junior partners"] were employees and the partnership was employer within the meaning of the Fair Labor Standards Act" (139 F. 2d at 182).

of domination and control." Referring to "the carefully considered decision of *Walling* v. *American Needlecrafts,*" 139 F. 2d 60 (C.A. 6), *supra,* p. 29, Judge Parker said it was "on 'all fours' with the case here, except as to the effect of the intervention of the cooperative," 176 F. 2d at 637.[20] In *American Needlecrafts,* there was a district court finding, comparable to the finding in the instant case, that the contract had been "bona fidely entered into" (46 F. Supp. at 23 (W.D. Ky.)), and the opinion of the court of appeals was not predicated upon any different assumption. Nor was there any suggestion in the *Harwood* and *Twyeffort* decisions, *supra,* that the contracts were not equally "bona fide."

These decisions, like numerous rulings on other aspects of the Fair Labor Standards Act, rest upon the premise that the statutory requirements are "mandatory * * * regardless of the good faith of the employer." *Rigopoulos* v. *Kervan,* 140 F. 2d 506, 507 (C.A. 2). As this Court has stated, "The statute was a recognition of the fact that * * * certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce." *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697, 706–707; see also *West Coast Hotel*

[20] Also, contrary to the apparent assumption by the court below, the Fourth Circuit directed that the decree enjoin the cooperative as well as the bag companies, thus indicating its view that the cooperative was also the employer of the homeworkers.

Co. v. *Parrish,* 300 U.S. 379, and cases cited at pages 392–393.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

HAROLD C. NYSTROM,
Acting Solicitor,

BESSIE MARGOLIN,
Assistant Solicitor,

SYLVIA S. ELLISON,
Attorney,
Department of Labor.

JULY 1960.

APPENDIX A

In the United States Court of Appeals for the First Circuit

No. 5513

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF, APPELLANT

v.

WHITAKER HOUSE COOPERATIVE, INC., ET AL., DEFENDANTS, APPELLEES.

Appeal from the United States District Court for the District of Maine

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*

[170 F. Supp. 743]

Sylvia S. Ellison, Attorney, with whom *Harold C. Nystrom,* Acting Solicitor of Labor, *Bessie Margolin,* Assistant Solicitor, *William Massar,* Attorney, and *Thomas L. Thistle,* Regional Attorney, were on brief, for appellant.

Philip S. Bird, with whom *Bird & Bird* was on brief, for appellees.

OPINION OF THE COURT

March 2, 1960

HARTIGAN, *Circuit Judge.* This is an appeal from a judgment of the United States District Court for the District of Maine entered for the defendants after a trial before the court sitting without a jury.

The action was brought by the Secretary of Labor under Section 11(a) of the Fair Labor Standards Act of 1938, 52 Stat. 1066 (1938), 29 U.S.C. § 211(a) (1958), to enjoin defendants from violating certain provisions of the Act. The complaint, in the parts pertinent to this appeal, alleged that since July 18, 1957 defendant Whitaker House Cooperative, Inc., defendant Philip S. Bird as president of the cooperative, and defendant Evelyn M. Whitaker as general manager of the cooperative, have violated the provisions of Sections 15(a)(1), 15(a)(2) and 15(a)(5) of the Act by paying substandard wages, and by failing to keep records and to obtain certificates for homeworkers as required by the regulations issued under the Act. It was conceded by the defendants that the violations had occurred if the Act is applicable. It was stipulated that the only question for the district court's determination was whether the homeworkers, all of whom are members of the cooperative, are "employees" within the meaning of Section 3 of the Act.

The Secretary contended, first, that the cooperative is not a *bona fide* cooperative controlled by its members, and that, in reality, the individual defendants control the cooperative, hence an employment relationship exists between the homeworker-members and the individual defendants; and second, even if the cooperative is a *bona fide* cooperative controlled by its members, the Act applies to such a member-controlled cooperative. The district court found that the individual defendants do not control the cooperative or its members, and that the members are not as a matter of economic reality working for the individual defendants. The Court also held that the provisions of the Act are not applicable to a *bona fide* cooperative controlled by the member-producers.

Findings of facts by the court sitting without a jury shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. Fed. R. Civ. P. 52(a). The parts of the record cited to us do not establish that the district court was clearly erroneous in its finding that the cooperative was a *bona fide* cooperative controlled by the member producers. The record indicates that the members of the cooperative took an active part in the management of the cooperative affairs through the directors. The evidence of various changes in the line of items produced, in the prices charged, in the auditing and bookkeeping procedures, and in the manner of payment in order to adapt to the problem of inventory accumulation, as well as the evidence of a restricted role for Mrs. Whitaker all demonstrate the correctness of the district court's finding of a *bona fide* cooperative with control by the member-producers.

Fleming v. *Palmer*, 123 F. 2d 749 (1 Cir. 1941), cert. denied sub. nom. *Caribbean Embroidery Cooperative, Inc.* v. *Fleming*, 316 U.S. 662 (1942), is distinguishable as not being a *bona fide* cooperative, so that in economic reality the members of the cooperative were in an employee relation to Palmer, and the cooperative amounted to no more than a manner of paying the workers. In *McComb* v. *Homeworkers' Handicraft Cooperative*, 176 F. 2d 633 (4 Cir.), cert. denied 338 U.S. 900 (1949), the cooperative was found to be merely a conduit for paying the homeworkers who in reality were employees of the bag companies, and it was held that since an employer-employee relationship existed the Act applied. Here the record revealed that the member-producers were engaged in this enterprise on their own account. See *id.* at 640.

The essential factor in determining the application of the Act is whether or not there is an employment relationship, for that is the frame of reference in which Congress placed its mandates. Although the purposes of the Act have been broadly stated as "to exclude from interstate commerce goods produced * * * under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being * * *" *United States* v. *Darby*, 312 U.S. 100, 109 (1941), the statute is drawn clearly to apply to employment relationships. See, e.g. Sec. 206, 52 Stat. 1062 (1938), 29 U.S.C. § 206 (1958).

The Act states:

> "(a) 'Person' means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.
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> * * * * *
>
> "(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * *
>
> "(e) 'Employee' includes any individual employed by an employer.
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> * * * * *
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> "(g) 'Employ' includes to suffer or permit to work. * * *" 52 Stat. 1060 (1938), 29 U.S.C. § 203 (a), (d), (e), (g) (1958).

The language of these sections is not very helpful in deciding the instant case. However, the test of the applicability of the Act has been held to be whether or not as a matter of economic fact there is an employer-employee relationship involved. *Fleming* v. *Palmer, supra; Mitchell* v. *Nutter*, 161 F. Supp. 799 (D. Me. 1958).

It is clear that a cooperative can have employees. *Farmers Irrigation Co.* v. *McComb*, 337 U.S. 755

(1949); *Puerto Rico Tobacco Marketing Coop. Ass'n* v. *McComb*, 181 F. 2d 697 (1 Cir. 1950). But those cases did not involve the question of whether member-producers of a cooperative are considered employees of the cooperative and consequently within the provisions of the Act.

The only case which apparently involved this precise question was the district court decision in *Fleming* v. *Palmer, supra*, which was not reported. The district court's refusal there to enjoin the cooperative in regard to its members resulted from the court's conclusion that no employer-employee relationship existed. *Id.* at p. 751. An analogous conclusion as to a partnership involving approximately one hundred persons was reached by the district court in *Walling* v. *Plymouth Mfg. Corporation*, 46 F. Supp. 433 (N.D. Ind. 1942), aff'd on other grounds, 139 F. 2d 178 (7 Cir.), cert. denied 322 U.S. 741 (1943). In each of those cases, however, the Court of Appeals stated that it was unnecessary for it to decide the question of applicability of the Act to a *bona fide* enterprise.

Additional authority for the conclusion that the Act does not apply to a cooperative such as involved here is found in the statement of the Administrator of the Wage and Hour Division, U.S. Department of Labor, that in certain situations there might be no employer-employee relationship between a cooperative and its member-workers.[1]

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[1] 1941 WH Man. 58.

"APPLICATION TO COOPERATIVES

"QUESTION: Are cooperatives employers and are members who work for them employees within the terms of the Fair Labor Standards Act.

"ANSWER (ADMINISTRATOR): The term cooperative is used to describe various types of business organizations differing in form and method of operation. Accordingly, no statement can be made to cover all types of organizations calling themselves

We believe that the instant case presents such a situation. The members of the cooperative individually are the producers of the goods in which the cooperative deals. We agree with the district court's characterization that "the members are engaged, through the Cooperative, in a joint venture for the production and sale of hand-knit infants' outerwear." *Id.* at p. 755. Where the items produced by the members are the units used for measuring each member's share in the cooperative's net income, we think, to quote again from the district court's opinion: "Their interests as members and producers are identical. The work they perform is performed by them as mem-

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cooperatives. However, it may be said generally that no justification can be found for concluding the member-workers of cooperatives, otherwise covered, are not entitled to the benefits of the Act.

"Any doubt which exists must be based on the notion that cooperatives are, in effect, partnerships and that no employer-employee relationship exists between them and the members who work for them. Although it is possible that there may be 'workers' cooperatives in which the interests of the members as workers are in all respects the same as their interests as proprietors and in which the usual characteristics of the employer-employee relationship do not exist, and hence in which the worker-members would not be employees within the meaning of the Act, it is to be noted that cooperatives are commonly separate entities in which the usual characteristics of the employer-employee relationship exist as between them and worker-members.

"Cooperatives are generally in the corporate form with interests distinct from those of their members. Though their workers may be stockholders, as workers they are subject to the usual control and discipline of the corporate employer; they work at the discretion of the cooperative's board of directors or other managerial body. Their concern, as workers, with wages, hours of work and other working conditions, is quite distinct from and may be much greater than their interest, as stockholders, in profits or dividends.

* * * * *"

bers of the Cooperative, and not as its employees." Consequently, there is no employment relationship present in the production of the items and the Act is not applicable to this cooperative.

Judgment will be entered affirming the judgment of the district court.

WOODBURY, *Chief Judge* (concurring): The courts should always be alert to ferret out and ever ready to strike down evasive schemes designed to circumvent the Fair Labor Standards Act. But there is a wide and well recognized difference between evasion and avoidance, and although the Cooperative here may have been organized to avoid the Act, if it is a *bona fide* organization, as we all agree, and not a sham as in *Fleming* v. *Palmer,* it seems to me that in economic reality it is an organization engaged in the business of marketing such of the products of its producer-members as they may see fit to submit to it for sale. As a sales agency for its producer-members it may have employees, but however broadly the term may be defined, I do not see how it can be said to be an "employer" with respect to its producer-members. I vote to affirm.

ALDRICH, *Circuit Judge* (dissenting): I regret that I am unable to concur in the opinion of the court in this case. I quite agree that the district court's finding that the workers are not employees of the individual defendants, Bird and Whitaker, is based on substantial evidence, and must be sustained. In other words, the corporate defendant, hereinafter called Cooperative, must be taken to be member-controlled, and not the alter ego of the individual defendants. But the court errs when it says that it is controlled by

"the" members. It is clear that it is controlled by only some of them. A substantial number live outside of the state, in another part of the country, and obviously take no part.* Others live in distant portions of the state, or are old or infirm, or for other reasons do not find it worth their while to attend meetings. Such "members" cannot be said to exercise entrepreneurial skill, and they do not exercise, and in many instances are unable to exercise, any control, effective or otherwise. To them Cooperative simply furnishes an opportunity to do homework, and to dispose of it, that is to say, get paid for it. The workers are told what items to make, are paid at stated rates, and are "expelled" if their work does not measure up to Cooperative's standards. It seems to me that all inactive members differ in no respect from employees of any homework employer.

However, I think the matter lies deeper than this, and that the court is in error even if it could be assumed that all workers had a real vote, and an equal interest in Cooperative's affairs. Cooperative still constitutes an independent entity within the meaning of the Act, whether it be regarded as a corporation, or as an "organized group of persons." 29 U.S.C. § 203(a). Indeed, this fact is, concededly, the principal reason for its existence. As the organizational letter pointed out, it serves, among other things, to permit the members "to purchase supplies at wholesale prices," and "to market their products more readily." The testimony emphasized the vital importance of this. In the truest sense Cooperative "suffer[s] or permit[s these ladies] to work." 29 U.S.C. § 203(g). If it were not for its existence (or that of some similar central organizational group),

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*"Each member is entitled to one vote, to be cast in person and not by proxy." 170 F. Supp. 743, 749.

with the economic advantages flowing therefrom, no member could work at all. The organization of a group, all of whom will work in a unified direction, is a *sina qua non* of effective operation. Each member is working for the group, for its advantage, through the medium of Cooperative, and not simply for herself. This seems to me a peculiarly poor case in which to say that the worker "suffer[s] or permit[s herself] to work." Rather, it is Cooperative that is affording individual members the opportunity to work, and paying them for it.

If the thought is that Cooperative is simply a selling organization, because it serves to dispose of the product of its members, I suggest that it is no more a sales organization than is any other employer of homeworkers whose amount of production is self-controlled (but who were restricted to selling to it). Clearly it does much more than dispose of the product. It is true, as the court says, that the "items produced by the members are the units used for measuring each member's share in the cooperative's net income." But of what piecework employee is that not so, if one defines net income as the amount available from gross sales, after deductions, for labor and goods? Is the court saying it makes a difference because there is nothing provided by way of profits to stockholders?

I cannot help feeling that the court has been moved by sympathy with the natural desire of these ladies to make some use of their spare time, in an awareness of the predicament they would be in if the Act were to be held applicable. But there is another side to the coin. These ladies are competing with other producers who must, perforce, respect the standards of the Act. Because of the existence of Cooperative they can, or believe they can, compete

with other producers satisfactorily, whereas individually they could not hope to do so. If, for some reason, it is "fair" not to apply the Act to them, such a "fairness" is unfair to those others who must live up to it. Possibly the court feels that since the members are receiving from Cooperative all the proceeds available, the Act is inapplicable. However, neither economic inability to perform, nor the low commercial value of the work done, are considerations under the Act. Historically, the application of minimum-wage laws always threatens certain fringe, or marginal, activities. But it is not for the courts to temper the wind to the legislatively shorn lamb. *Mitchell* v. *Railway Express Agency,* D.C.D. Maine, 1958, 160 F. Supp. 628.

The fact that members exercise a joint voice over Cooperative's management, and elect officers and an executive committee, seems to me irrelevant. If a union were given a voice in management, would its members cease to be employees? If an employee acquires stock in his company, does he cease to be an employee? I do not believe that would be so even if the employees together acquired all of the stock—they would still be working for the corporate entity. Their employment status would remain, even though they might have acquired some additional status. Phrased in terms of the philosophy of the Act, this would be because while collectively they would have a voice, individually they would have none, or none of any consequence. And so here. The Supreme Court has emphasized that "employment" under this Act is broadly defined. *United States* v. *Rosenwasser,* 1945, 323 U.S. 360, 362; *Rutherford Food Corp* v. *McComb,* 1947, 331 U.S. 722, 728–29, reh. den., 332 U.S. 785. In a particular instance a court may believe, to quote the court

below, that some particular workers do not "require the protection of the Act." My brethren do not pick up this language, but I believe it accurately states their rationale. Perhaps, individually, some in fact do not. But I see no more basis for a court's saying that as the members "suffer or permit" themselves to work they do not require the protection of the Act, than there is for so determining as to any other worker who "voluntarily" chooses to work. That concept died a quarter of a century ago. I would reverse.

JUDGMENT

March 2, 1960

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged, and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(S) ROGER A. STINCHFIELD,
Clerk.

Approved:

(S) PETER WOODBURY, *C.J.*

APPENDIX B

STATUTE AND REGULATIONS INVOLVED

1. The pertinent provisions of the Fair Labor Standards Act of 1938, as amended (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910; c. 867, 69 Stat. 711, 29 U.S.C. 201, *et seq.*) are as follows:

> SEC. 3. [52 Stat. 1061] As used in this Act—
>
> (a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.
>
> * * * * *
>
> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee * * *.
>
> (e) "Employee" includes any individual employed by an employer.
>
> * * * * *
>
> (g) "Employ" includes to suffer or permit to work.
>
> * * * * *
>
> SEC. 6 [52 Stat. 1062; 63 Stat. 912; 69 Stat. 711] (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—
>
> (1) not less than $1 an hour;
>
> * * * * *
>
> SEC. 11. [52 Stat. 1066] * * * (c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall pre-

serve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

(d) [63 Stat. 916–917] The Administrator is authorized to make such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act, and all existing regulations or orders of the Administrator relating to industrial homework are hereby continued in full force and effect.

* * * * *

SEC. 15 [52 Stat. 1068] (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

* * * * *

(5) [63 Stat. 919] to violate any of the provisions of section 11(c) or any regulation or order made or continued in effect under the provisions of section 11(d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

* * * * *

2. As currently codified, the pertinent parts of the Regulations adopted pursuant to the Fair Labor Standards Act of 1938 reads as follows (29 C.F.R. Part 530):

§ 530.1 Definitions.

(a) The meaning of the terms "person", "employ", "employer", "employee", "goods", and "production", as used in this part, is the

same as in the Fair Labor Standards Act of 1938, as amended.

(b) "Industrial homeworker" and "homeworker", as used in this part, mean any employee employed or suffered or permitted to perform industrial homework for an employer.

(c) "Industrial homework", as used in this part, means the production by any person in or about a home, apartment, tenement, or room in a residential establishment of goods for an employer who suffers or permits such production, regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homeworker in such production.

* * * * *

(f) The knitted outerwear industry is defined as follows: The knitting from any yarn or mixture of yarns and the further manufacturing, dyeing or other finishing of knitted garments, knitted garment sections, or knitted garment accessories for use as external apparel or covering which are partially or completely manufactured in the same establishment as that where the knitting process is performed; and the manufacture of bathing suits from any purchased fabric: *Provided,* That the manufacturing, dyeing or other finishing of the following shall not be included:

(1) Knitted fabric, as distinguished from garment sections or garments, for sale as such.

(2) Fulled suitings, coatings, topcoatings, and overcoatings.

(3) Garments or garment accessories made from purchased fabric, except bathing suits.

(4) Gloves or mittens.

(5) Hosiery.

(6) Knitted garments or garment accessories for use as underwear, sleeping wear, or negligees.

* * * * *

§ 530.2 Restriction of homework.

No work in the industries defined in § 530.1 (d) through (j) shall be done in or about a home, apartment, tenement, or room in a residential establishment unless a special homework certificate issued and in effect pursuant to this part has been obtained for each homeworker or unless the homeworker is so engaged under the supervision of a Sheltered Workshop, as defined in § 525.1 of this chapter.

§ 530.3 Application on official forms.

Certificates authorizing the employment of industrial homeworkers in the industries defined in § 530.1 may be issued on the following terms and conditions upon application therefor on forms provided by the Wage and Hour and Public Contracts Divisions. Such forms shall be signed by both the homeworker and the employer.

§ 530.4 Terms and conditions for the issuance of certificates.

(a) Upon application by the homeworker and the employer on forms provided by the Wage and Hour and Public Contracts Divisions, certificates may be issued to the applicant employer authorizing him to employ a particular worker in industrial homework in a particular industry, provided that the application is in proper form and sets forth facts showing that the worker:

(1) (i) Is unable to adjust to factory work because of age or physical or mental disability; or

(ii) Is unable to leave home because his presence is required to care for an invalid in the home; and

(2) (i) Was engaged in industrial homework in the particular industry for which the certificate is applied, as such industry is defined in § 530.1, prior to: (a) April 4, 1942, in the button and buckle manufacturing in-

dustry; (b) November 2, 1942, in the embroideries industry; (c) April 1, 1941, in the gloves and mittens industry; (d) October 7, 1942, in the handkerchief manufacturing industry; (e) July 1, 1941, in the jewelry manufacturing industry; (f) August 20, 1941, in the knitted outerwear industry; or (g) March 5, 1942, in the women's apparel industry, (except that if this requirement shall result in unusual hardship to the individual homeworker it shall not be applied; or

(ii) Is engaged in industrial homework under the supervision of a State Vocational Rehabilitation Agency.

(b) No homeworker shall perform industrial homework for more than one employer in the same industry, but homework employment in one industry shall not be a bar to the issuance of certificates for other industries.

* * * * *

§ 530.9 Records and reports.

The issuance of a certificate shall not relieve the employer of the duty of maintaining the records required in the regulations in Part 516 of this chapter and failure to keep such records shall be sufficient cause for the cancellation of certificates issued to such an employer.

3. When originally issued on March 30, 1942 [7 F.R. 2592], the Regulations restricting the employment of homeworkers in the Knitted Outerwear Industry were codified as 29 CFR 617, and read, in pertinent part, as follows:

PART 617—MINIMUM WAGE RATE AND REGULATIONS APPLICABLE TO HOME WORKERS IN THE KNITTED OUTERWEAR INDUSTRY

* * * * *

§ 617.3 *Restriction of home work.* No work in the Knitted Outerwear Industry, as defined herein, shall be done in or about a home,

apartment, tenement, or room in a residential establishment after November 30, 1942, except by such persons as have obtained special home-work certificates issued pursuant to applicable regulations of the Wage and Hour Division, authorizing industrial home work by any worker who was engaged in industrial home work in the Knitted Outerwear Industry prior to August 20, 1941, or is at any time engaged in such industrial home work under the supervision of a State Vocational Rehabilitation Agency or of a Sheltered Workshop as defined in § 525.1 of this title, and who is unable to adjust to factory work because of age or physical or mental disability or is unable to leave home because his presence is required to care for an invalid in the home.

* * * * * *

§ 617.101 *Definitions.* As used in these regulations, the term "industrial home work" means the production by any person in or about a home, apartment, tenement, or room in a residental establishment, for an employer, of goods from material furnished directly by or indirectly for such employer.

The term "knitted outerwear industry" as used herein means: The knitting from any yarn or mixture of yarns and the further manufacturing, dyeing or other finishing of knitted garments, knitted garment sections, or knitted garment accessories for use as external apparel or covering which are partially or completely manufactured in the same establishment as that where the knitting process is performed; and the manufacture of bathing suits from any purchased fabric * * *

* * * * * *

4. The original Regulations, Part 617, were clarified on April 20, 1951, as follows [16 F.R. 3435]:

PART 617—KNITTED OUTERWEAR INDUSTRY, MINIMUM WAGE ORDER, HOME WORKERS

DEFINITION OF CERTAIN TERMS

The Administrator of the Wage and Hour and Public Contracts Divisions, pursuant to section 8 of the Fair Labor Standards Act of 1938, as amended, issued a minimum wage order for the Knitted Outerwear Industry, effective April 20, 1942. In conjunction with the issuance of this wage order the Administrator found that in order to carry out the purpose of the order and to prevent the circumvention or evasion thereof it was necessary to include in the order a provision restricting home work in the industry. To accomplish this restriction the Administrator issued regulations which provided that "no work" in the industry "shall be done in or about a home, apartment, tenement, or room in a residential establishment," except under special certificates to be issued only under specified conditions, and which, among other things, defined the term "industrial home work" as the "production by any person in or about a home, apartment, tenement, or room in a residential establishment for an employer of goods from materials furnished directly by or indirectly for such employer."

The Administrator is of the opinion that the regulations were intended to apply to all employment in home work whereb goods are produced for or on behalf of members of this industry, regardless of the source of the materials used by the homeworkers, and has been enforcing the regulations on the basis that homeworkers employed in this industry were subject to the act and the regulations whether they produced directly for an employer or distributor, or under a so-called "purchase and sale" or "agency" arrangement or other de-

vices designed to disguise the employment relation. The fact that the regulations have been so construed and enforced has been well known to the members of the industry through the institution of court proceedings by the Administrator and the Secretary of Labor (Tobin v. Wagner, infra; Tobin v. Harwood, 10 W.H. Cases 73 (W.D. Tenn.); Tobin v. Van Wagemen-Sager, Inc. (N.D.N.Y. No. 3129)), and through court decisions upholding such construction (Tobin v. Harwood, 10 W.H. Cases 73 (W.D. Tenn.); Cf. Walling v. Wolff, 63 Fed. Supp. 605 (N.D.N.Y.))

Most of the members of this industry who formerly used or dealt with homeworkers have for years been under court injunction prohibiting the employment of homeworkers except in accordance with the statutory minimum and overtime requirements, and from using any "purchase and sales arrangements with any home workers" to avoid the requirements of the Act or the injunction "whether the materials are furnished by defendants or by others" (Jacobs v. Hand Knitcraft Institute, Civil 6–354 (S.D. N.Y.) 2 Wage and Hour Reporter 499, decree entered November 21, 1939).

The administrative authority to regulate or prohibit such home work clearly exists, particularly since the addition of section 11(d) to the Fair Labor Standards Act of 1938 by the Fair Labor Standards Amendments of 1949 (63 Stat. 910, 29 U.S.C. sec. 211(d)). In a recent decision by the United States Court of Appeals for the Second Circuit in the case of Tobin v. Wagner Company, Inc., (March 21, 1951), the Court expressly recognized the administrative authority to regulate such home work, but questioned the intended scope of the present regulations on the ground that the language defining "industrial home work" is not sufficiently clear in the absence of "published rulings" giving notice of the administrative construction of

such language as being applicable to situations where the homeworkers obtain their materials from a source independent of the person for whom the goods are being produced.

* * * * *

Now, therefore, pursuant to authority vested in me by section 11(d) of the Fair Labor Standards Act of 1938, as amended, § 617.101 is amended to read as follows:

§617.101 *Definitions.* The meaning of the terms "person," "employ," "employer," "employee," "goods," and "production" as used in this part is the same as in the Fair Labor Standards Act of 1938, as amended.

"Industrial homeworker" and "homeworker," as used in this part, mean any employee employed or suffered or permitted to perform industrial home work for an employer.

"Industrial home work," as used in this part, means the production by any person in or about a home, apartment, tenement, or room in a residential establishment of goods for an employer who suffers or permits such production, regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homeworker in such production.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1960